APR 29 1974
MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1629

NORMA SCHEELHAASE,

Petitioner,

v.

WOODBURY CENTRAL COMMUNITY SCHOOL DISTRICT; W. B. DEVINE, Superintendent; LEWIS FOSTER, President of the Board of Education of the Woodbury Central Community School District; JAMES UTESCH, RUSSELL WALKER, DWIGHT RAWSON, LEONARD CASSENS, DWAIN BAIRD and DARRELL SULZBERGER, members of the Board of Education of the Woodbury Central Community School District, and their successors in title, if any, and SYLVAN BRYAN and DALE WEAVER,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	19
Appendix:	
Opinion of Court of Appeals	*App.* 1
Order of Court of Appeals denying petition for rehearing	*App.* 16
District Court's findings of fact and conclusions of law	*App.* 17
District Court's judgment	*App.* 19
District Court's opinion and order denying motion for new trial	*App.* 20

TABLE OF CITATIONS

Cases:

Arnett v. *Kennedy*, 42 L.W. 4513 (1974) 8, 14, 15, 18

Board of Regents v. *Roth*, 408 U.S. 564 (1972) 8, 12-18

Boyce v. *Alexis I. duPont School District*, 341 F. Supp. 678 (D.Del. 1972) 9

Buhr v. *Buffalo School District No. 39*, 364 F. Supp. 1225 (D.N.D. 1973) 17

Cafeteria Workers v. *McElroy*, 367 U.S. 886 (1961) 10-12

Cramp v. *Board of Public Instruction*, 368 U.S. 278 (1961) 12

Don v. *Okmulgee Memorial Hospital*, 443 F.2d 234 (10th Cir. 1971) 10

Drown v. *Portsmouth School District*, 451 F.2d 1106 (1st Cir. 1971) 8, 9

Endicott v. *Van Petten*, 330 F. Supp. 678 (D.Kan. 1971) 17

Page

Fisher v. *Snyder*, 476 F.2d 375 (8th Cir. 1973) 8, 17

Flemming v. *Nestor*, 363 U.S. 603 (1960) 8, 14

Heaphy v. *United States Treasury Department*, 354 F. Supp. 396 (S.D.N.Y. 1973) 9

Hetrick v. *Martin*, 480 F.2d 705 (6th Cir. 1973) 9

Jeffries v. *Turkey Run Consolidated School District*, No. 73-1535 (7th Cir. Feb. 5, 1974) 9

Johnson v. *Branch*, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967) 8, 9

Konigsberg v. *State Bar*, 353 U.S. 252 (1957) 8

Lucas v. *Chapman*, 430 F.2d 945 (5th Cir. 1970) 9

Mathias v. *New Castle County Vocational Technical School District*, Civ. Ac. No. 4073 (D.Del. Aug. 31,1972) 17

McEnteggart v. *Cataldo*, 451 F.2d 1109 (1st Cir. 1971) 9

National Education Association v. *Lee County Board of Public Instruction*, 467 F.2d 447 (5th Cir. 1972) 16

Norton v. *Macy*, 417 F.2d 1161 (D.C. Cir. 1969) 9

Perry v. *Sindermann*, 408 U.S. 593 (1972) 6, 8, 12-15, 18

Pickering v. *Board of Education*, 391 U.S. 563 (1968) 8

Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1957) 8, 12

Serrano v. *Priest*, No. 938,254 (Superior Court of the State of California for the County of Los Angeles, Apr. 10, 1974), on remand from 5 Cal. 3d 584, 96 Cal. Reptr. 601 (1971) 5

Simard v. *Board of Education of the Town of Groton*, 473 F.2d 988 (2nd Cir. 1973) 17

United Public Workers v. *Mitchell*, 330 U.S. 75 11

Wieman v. *Updegraff*, 344 U.S. 183 (1952) 8, 10, 11

Zimmerer v. *Spencer*, 485 F.2d 176 (5th Cir. 1973) 16

Page

Constitutional and Statutory Provisions:

Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983 ..... 3, 6

Connecticut Gen. Stat. § 10-151 17

Constitution of the United States, Amendment Fourteen .. 2, 3, 6, 7, 12, 13, 14

14 Delaware Code § 1410 17

Iowa Code 279.13 (1971) 2, 3, 4, 6, 14, 15, 16

Iowa Code 279.24 (1971) 16

Judicial Code, 28 U.S.C. § 1254 (1) 2

Kansas Statutes Annotated 72-5411 17

Nebraska Rev. Stat. § 79-1254 17

North Dakota Civil Code § 15-47-38 17

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NORMA SCHEELHAASE,

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WOODBURY CENTRAL COMMUNITY SCHOOL DISTRICT, ET AL., RESPONDENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Petitioner requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 488 F.2d 237, and is reproduced in the Appendix to this Petition at *App.* 1-16. The Order of the Court of Appeals denying the petition for rehearing is not yet officially reported, and is reproduced in the Appendix at *App.* 16-17.

The findings of fact and conclusions of law entered by Chief Judge Edward J. McManus of the United States District Court for the Northern District of Iowa are reported at 349 F.Supp. 988, and are reproduced at *App.*

17-19. The judgment of the District Court is at *App.* 19-20. The Order and Opinion of the District Court denying defendants' motion for a new trial is at *App.* 20-22.

JURISDICTION

The decision and judgment of the Court of Appeals were entered on November 28, 1973. A timely petition for rehearing was filed, and was denied on January 30, 1974. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, consistent with the due process clause of the Fourteenth Amendment, a public employee who lacks a "property" interest in continued employment may be terminated arbitrarily and capriciously.

2. Whether the Iowa "continuing contract" statute, which provides that teachers' employment contracts are "automatically continued" from year to year unless "terminated", and that termination must be preceded by prior notice to the teacher of the "specific reasons" for contemplated termination and an opportunity for a public hearing, confer upon a ten-year teacher a "property" interest in continued employment entitling her to due process protection.

3. Whether it is arbitrary and capricious, in violation of the due process clause of the Fourteenth Amendment, for a school board to terminate a teacher's employment for the sole reason that her students scored below average on standardized achievement tests, where the evidence introduced at the school board hearing discloses that the publisher of the tests and testing experts all agree that student performance on the tests is not a reliable indicator of teaching performance.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

STATEMENT OF THE CASE

Petitioner, Norma Scheelhaase, was employed for ten years, from 1960 through 1970, as a teacher of language arts in the seventh grade of Climbing Hill Public School, Climbing Hill, Iowa. This case arose out of the school board's decision to terminate her employment at the close of her tenth teaching year.

Iowa is a "non-tenure" state. Teachers do not acquire tenure no matter how many years they teach. Rather, teachers are accorded a "continuing" contract by state statute, one which is "automatically continued" from year to year "until terminated as hereinafter provided." Iowa

Code 279.13 (1971). If a school board wishes to terminate a teacher's contract at the end of a school year, it must first furnish the teacher at least ten days' written notice that it is "considering termination of said contract." The teacher may then receive, upon demand, "a written statement of specific reasons for considering termination" and a private conference with the school board. Thereafter, the teacher is entitled, upon demand, to a public hearing before the school board. "Upon the conclusion of the hearing, the Board shall determine the question of continuance or discontinuance of the contract by a roll call vote." Termination, to be effective, must be accomplished on or before April 15. *Ibid.*

On March 13, 1970, as petitioner's tenth year of teaching was drawing to a close, she was notified that the school board was contemplating termination of her employment. The sole reason specified for the proposed termination was that her students had scored below the norm on certain standardized tests, the Iowa Test of Basic Skills and Iowa Test of Educational Development.

In accordance with Iowa law, petitioner requested and was afforded a private conference with the school board, and subsequently a public hearing before the school board. At that hearing, petitioner introduced extensive evidence to show that her students' scores on these tests were not a rational basis for evaluating her teaching performance.

First, petitioner introduced the manual prepared by the publisher of the tests. The manual stated that it would be a "misuse" of the tests "to judge the effectivensess of an individual teacher on the basis of the test scores made by his class." The manual stated that using the test scores as the sole measure of teaching efficiency

> "is false in principle and vicious in its results. It ignores the effects of differential class ability, previous educa-

> tional experiences, adequacy of instructional materials, effectiveness of supervisory assistance, and pupil and parental attitudes toward school achievement. . . . Because these tests deal with broad areas of achievement rather than with specific subjects, it is clear that they cannot be used as valid measures of teaching effectiveness in a single course."

In prophetic anticipation of petitioner's fate, the manual continued:

> "If, then, the pupils under teacher Clara Jones make an average score seriously below the norm on most of the tests in the battery, it does not necessarily follow that Miss Jones has not been doing all that could be reasonably expected of her in instruction."

The manual concluded that students' test scores, if used as the sole measure of teaching performance, "may do serious injustice to many teachers."

Petitioner also introduced testimony by experts in the testing field corroborating the test publisher's advice that student performance on the tests cannot rationally be used as the sole measure of teaching performance.[1] The only contradictory testimony was the school superintendent's as-

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[1] This testimony reflects the universal opinion of experts in this field. In *Serrano* v. *Priest*, No. 938,254 (Superior Court of the State of California for the County of Los Angeles, Apr. 10, 1974), on remand from *Serrano* v. *Priest*, 5 Cal. 3d 584, 96 Cal. Reptr. 601 (1971), the court was called upon to determine whether California's system of financing its public schools violated the equal protection clause of the State Constitution. The court received extensive expert testimony on the significance of student performance on standardized tests. The court found that while there were "highly conflicting" views on many issues, "there is uniformity of agreement that a variety of both non-school and school factors do play a role in affecting pupil achievement on the standardized tests." (Slip opin., page 88; the expert testimony is described at pages 78-88). Copies of this slip opinion have been lodged with the Clerk.

sertion, which he did not amplify, that in his opinion student test scores are a valid basis for teacher evaluation.

Petitioner also introduced expert testimony at the hearing that her students had achieved low test scores in their prior school year (i.e. before she began to teach them), and that the scores achieved by them following her tutelage represented "normal growth" for them. Again, the lone contrary evidence at the hearing was the school superintendent's unamplified assertion that the students had not shown normal growth in their test scores.

Notwithstanding the evidence introduced by petitioner, the school board members, proceeding to a vote without deliberation immediately upon the conclusion of the introduction of evidence, voted to terminate her employment because of her students' low test scores.

Petitioner thereupon instituted this action pursuant to 42 U.S.C. § 1983 in the District Court for the Northern District of Iowa, alleging that the termination of her employment solely because of her students' test scores was arbitrary and capricious, and therefore violative of the due process clause of the Fourteenth Amendment.

Following a trial, the district court granted judgment in petitioner's favor. The court held that the Iowa statute conferred upon petitioner a "property" interest in continued employment, within the meaning of this Court's decision in *Perry* v. *Sindermann,* 408 U.S. 593 (1972) (*App.* 18, 21-22). The court found that the sole reason for plaintiff's termination was that her students had achieved below-average scores on the standardized tests (*App.* 18, 21). The court concluded that terminating employment solely on that basis was arbitrary and capricious, both because the test scores alone were not a rational measure of teaching competence and because, in any event, the test scores indicated that petitioner's students had achieved nor-

mal educational growth during the period in which she taught them. (*App.* 18-19). The court ordered that petitioner be reinstated to her teaching position and awarded backpay (*App.* 20).[2]

The defendants appealed, and the court below reversed. It overturned the district court's ruling that petitioner had a "property" interest in continued employment (*App.* 4-8). It rejected petitioner's alternative argument that she did not need such an interest to be free from arbitrary and capricious employment termination (*App.* 8-13). Having thus determined that petitioner had no constitutional protection against arbitrary and capricious employment termination, the court below refrained from deciding whether, as the district court had held, petitioner's termination was arbitrary and capricious (*App.* 13).

In a concurring opinion, Judge Bright disagreed with the majority's ruling that petitioner had no protection against arbitrary and capricious employment termination, but concluded that petitioner's termination was not arbitrary and capricious. Judge Bright reasoned that the superintendent's testimony at the school board hearing that the students' low test scores were a legitimate basis for teacher evaluation, although "apparently erroneous," furnished a sufficient predicate to render the school board's decision not arbitrary and capricious (*App.* 13-15).

A timely petition for rehearing was denied (*App.* 16-17).

REASONS FOR GRANTING THE WRIT

1. It is well established that the due process clause of the Fourteenth Amendment affords protection to individuals against arbitrary and capricious treatment by the State.

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[2] The court characterized the monetary award as "damages" (*App.* 20), but explained that "the damages awarded are for lost earnings" (*App.* 21).

Schware v. *Board of Bar Examiners,* 353 U.S. 232, 239 (1957); *Konigsberg* v. *State Bar,* 353 U.S. 252, 262, 273 (1957); *Wieman* v. *Updegraff,* 344 U.S. 183, 191-192 (1952).[3] What is not so well established is the nature of the interest which the individual must possess in order to be entitled to invoke that protection.

This case poses the question whether a public employee who lacks a "property" interest in continued employment, (and who is not, therefore, entitled to *procedural* due process[4]), is nonetheless constitutionally protected against *arbitrary and capricious* termination of that employment. That question is one which has received recurrent consideration by the courts of appeals, and upon which they are in conflict. The decision of the court below, in concluding that petitioner was not entitled to such protection, is in direct conflict with decisions of several other circuits. Additionally, it is in apparent conflict with pronouncements of this Court. In view of the confusion and conflict among the lower courts, and the frequency with which this issue has arisen, the question is one which should be decided by this Court.

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[3] See also *Flemming* v. *Nestor,* 363 U.S. 603, 611 (1960); *Fisher* v. *Snyder,* 476 F.2d 375 (8th Cir. 1973); *Drown* v. *Portsmouth School District,* 451 F.2d 1106, 1108 (1st Cir. 1971). A denial of continued employment has been held to be arbitrary and capricious if, *inter alia,* it is for an irrational reason, i.e. a reason bearing no relationship to the teacher's fitness to teach, or, even if the cited reason is rational, if there is no evidence to support the application of that reason to the teacher, *Schware, supra,* 353 U.S. at 239; *Fisher, supra,* 476 F.2d at 377; *Drown, supra,* 451 F.2d at 1108, or if the reasons are so "trivial" that a school board "could not rationally have considered them as detrimental to the interests of the schools," *Pickering* v. *Board of Education,* 391 U.S. 563, 578 n. 1 (1968); *Johnson* v. *Branch,* 364 F.2d 177 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967).

[4] *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Arnett* v. *Kennedy,* 42 L.W. 4513 (1974).

The Eighth Circuit in the decision below, and the Seventh Circuit in *Jeffries* v. *Turkey Run Consolidated School District,* No. 73-1535 (7th Cir. Feb. 5, 1974), have held that a public employee lacking a "property" interest in continued employment is not constitutionally protected against arbitrary and capricious employment termination. The Sixth Circuit has suggested the same in *dictum. Hetrick* v. *Martin,* 480 F.2d 705, 709 (6th Cir. 1973). These courts have reasoned that the interests required to invoke protection against arbitrary and capricious treatment are identical to those required for entitlement to procedural due process.[5] By contrast, the First, Fourth, and District of Columbia Circuits have held that *all* public employees, including those lacking a sufficient interest to warrant procedural protection, are protected against arbitrary and capricious employment termination, and the Fifth Circuit in *dictum* has agreed. *Drown, supra,* 451 F.2d at 1108 (1st Cir. 1971); *McEnteggart* v. *Cataldo,* 451 F.2d 1109 (1st Cir. 1971); *Johnson* v. *Branch,* 364 F.2d 177, 180-181 (4th Cir. 1966), cert. denied 385 U.S. 1003 (1967); *Norton* v. *Macy,* 417 F.2d 1161, 1164 (D.C. Cir. 1969); *Lucas* v. *Chapman,* 430 F.2d 945, 947-948 and n. 2 thereat (5th Cir. 1970).[6] See

[5] Because this Court ruled in *Roth* and *Sindermann* that where the grounds for termination would stigmatize the teacher, injuring reputation or interfering with opportunities for other employment, procedural due process would be owed because of the deprivation of "liberty", these courts of appeals have held that a "liberty" interest, too, cannot be interfered with arbitrarily or capriciously. The instant case does not involve a claimed interference with liberty interests, and accordingly our discussion herein focuses on the need for a "property" interest.

[6] Additionally, although the Second and Third Circuits have not ruled on this question, district courts within those Circuits have held that public employees lacking sufficient interests to warrant procedural protection nonetheless may not be denied continued employment arbitrarily or capriciously. *Heaphy* v. *United States Treasury Department,* 354 F. Supp. 396, 401 (S.D.N.Y. 1973); *Boyce* v. *Alexis I. duPont School District,* 341 F. Supp. 678, 686 (D. Del. 1972).

also, *Don* v. *Okmulgee Memorial Hospital,* 443 F.2d 234, 238 (10th Cir. 1971) (applicant for admission to staff of public hospital, although not entitled to a hearing prior to denial of admission, is "entitled to overall fairness and a good faith consideration of his qualifications and background").

In limiting constitutional protection against arbitrary and capricious treatment to those public employees whose interests are sufficient to entitle them to procedural due process, the decision below also conflicts with prior declarations of this Court. In *Wieman* v. *Updegraff,* 344 U.S. 183, 191-192 (1952), this Court declared that those who do not have a "right" to public employment nonetheless may not be denied such employment for reasons which are "patently arbitrary and discriminatory":

> "We are referred to our statement . . . that persons seeking employment in New York have 'no right to work for the State in the school system on their own terms . . .' To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion . . .is patently arbitrary and discriminatory."

Thereafter, in *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 (1961), this Court expressly drew a distinction between the interests necessary to invoke procedural due process and those necessary to invoke protection against arbitrary and capricious treatment. The Court held that an employee in a Naval Gun Factory did not have an interest sufficient to entitle her to procedural due process in connection with the withdrawal of her security clearance, but "assume[d]" that her interest was sufficient to protect

against exclusion from employment which was "patently arbitrary or discriminatory":

> It is argued that this view of Rachel Brawner's interest [as not sufficient to entitle her to notice and hearing] is inconsistent with our decisions in *United Public Workers* v. *Mitchell,* 330 U. S. 75, and *Wieman* v. *Updegraff,* 344 U.S. 183. In those two cases an individual's interest in government employment was recognized as entitled to constitutional protection, and it is contended that what the Court said in deciding them would require us to hold that Rachel Brawner was entitled to notice and hearing in this case. In *United Public Workers* the Court observed that "[n]one would deny" that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' " 330 U. S., at 100. in *Wieman* the Court held unconstitutional a statute which excluded persons from state employment solely on the basis of membership in alleged "Communist-front" or "subversive" organizations, regardless of their knowledge concerning the activities and purposes of the organizations to which they had belonged. In the course of its decision the Court said, "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U.S., at 192.

Nothing that was said or decided in *United Public Workers* or *Wieman* would lead to the conclusion that Rachel Brawner could not be denied access to the Gun Factory without notice and an opportunity to be heard. Those cases demonstrate only that the state and federal

governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer. But to acknowledge that there exist constitutional restraints upon state and federal governments in dealing with their employees is not to say that all such employees have a constitutional right to notice and a hearing before they can be removed. *We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory —that she could not have been kept out because she was a Democrat or a Methodist. It does not follow, however, that she was entitled to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational and in accord with the contract with M & M.* (367 U.S. at 897-898; emphasis added).

See also, *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 288 (1961); *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239 n. 5 (1957).

The current confusion among the lower courts stems from this Court's differing treatment in *Roth* and *Sindermann* of two other protections afforded by the due process clause of the Fourteenth Amendment: the procedural protection of notice and hearing, and the substantive protection against adverse action taken in retaliation for the exercise of the constitutional right to freedom of speech. With respect to *procedural* protection, this Court read the due process clause literally: as the clause provides for due process protection only when "liberty" or "property" is endangered, only a showing of such a "liberty" or "property" interest entitles the individual to procedural due process (*Roth, supra,* 408 U.S. at 571-572). With respect to the free speech issue, on the other hand, this Court abjured the literal approach. It held that *all* public employees—including those lacking the

requisite interest to invoke *procedural* due process—are protected by the due process clause against employment termination for exercising their right of free speech (*Sindermann, supra,* 408 U.S. at 597).[7]

This case involves yet a third protection afforded by the due process clause—that against arbitrary and capricious treatment—and the question is which of the analytical approaches in *Roth* and *Sindermann* is applicable. It is our contention that this "substantive" aspect of due process is more akin to the free speech issue, and should be treated in the same manner. Indeed, this Court's discussion of the free speech issue in *Sindermann* (408 U.S. at 597) closely paralleled its prior discussions in the "arbitrary and capricious" cases:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government may not rely*" (Emphasis added).

And among the cases cited in *Sindermann* as representative of this "general principle" (*Ibid*) were *United Public Workers* and *Wieman.*

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[7] Nor can this be explained as a literal reading of the due process clause, by treating freedom of speech as a "liberty." For a literal reading would then produce the result that, when free speech is implicated, all that the due process clause affords is a right to notice and hearing. The Court made clear in *Sindermann* that that was *not* its holding: the right to protection against termination for speech is absolute ("there are some reasons upon which the government may not rely", *Sindermann, supra,* 408 U.S. at 597); indeed, an assertion of interference with free speech does *not* entitle the individual to notice and hearing (*Id.* at 599, n. 5), the result which a literal reading of the due process clause would yield.

The decision below, conflicting as it does with decisions of several other circuits and with prior declarations of this Court, should be reviewed by this Court. Whether a ten-year public employee, even if she lacks the "property" interest necessary for procedural due process, nevertheless has an interest "of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause" (*Fleming* v. *Neston,* 363 U.S. 603, 611 (1960)) is a question which should be answered definitively by this Court.

2. If a "property" interest (in the *Roth-Sindermann-Arnett* sense) *is* required in order to enjoy constitutional protection against arbitrary and capricious employment termination, then this case presents an important question—not yet decided by this Court—as to whether the Iowa "continuing contract" statute, which is similar to those in several other states (see *infra,* p. 17), confers such a "property" interest.

In *Roth, Sindermann,* and most recently in *Arnett,* this Court, declaring that "property" interests "may take many forms" (*Roth,* 408 U.S. at 576), discussed the types of interests in continued employment which create a property interest deserving procedural due process protection. An employee with "tenure", or with a contractually guaranteed term of employment, has "interests in continued employment" amounting to a property interest (*Id.* at 576-577). Likewise, a teacher "hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment" has a property interest (*Id.* at 577).

In *Sindermann,* this Court explained that, even absent a statutory or contractual promise of continued employment, a property interest might be found from "the promisor's words and conduct in the light of the surrounding circumstances", particularly as illuminated by the "usage of the past" (408 U.S. at 602). The Court held that Sindermann's allegations, if proved, would add up to a property interest, for:

> "In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent 'sufficient cause'." (*Id.* at 602-603).

In *Roth,* by contrast, the Court held that the teacher did not have a property interest, for:

> "[T]he important fact in this case is that [the teacher's terms of appointment] specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent 'sufficient cause'. Indeed, they made no provision for renewal whatsoever.
>
> "Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it." (*Id.* at 578).

The instant case presents the question of whether a property interest is created by a statutory scheme which differs from those discussed in *Roth, Sindermann* and *Arnett.* Unlike *Roth,* teachers in Iowa are not employed on an annual basis under contracts which are silent as to continued employment. Rather, the Iowa statute invests all teachers

with a "continuing" contract, one which remains in effect from year to year unless terminated by the state in accordance with specified procedures. Moreover, the statute, while not articulating a limited set of grounds upon which termination can be predicated,[8] does require that the school board provide the teacher written notice that it "is considing termination of said contract," and, if the teacher thereupon so requests, requires that the school board furnish the teacher "a written statement of *specific reasons* for considering termination." (Emphasis added). The statute further provides that a teacher, upon receiving such notification, may have "a private conference with the board" and, thereafter, at his request, "a public hearing" upon the board's contemplated action.

Thus, the Iowa statute accords teachers "continuing" contracts, and it provides them those procedural protections which the Fourteenth Amendment would require only for those teachers possessing a property interest. The question is whether Iowa thereby has statutorily invested its teachers with such a property interest. Stated otherwise, does the "continuing" contract statute, including its requirements that there be "specific reasons" for contemplated termination of employment and that a public hearing be afforded at which those reasons may be contested, invest the teacher with a sufficient "objective expectancy" of continued employment to constitute a property interest? Cf. *National Education Association* v. *Lee County Board of Public Instruction,* 467 F.2d 447, 452 (5th Cir. 1972); *Zimmerer* v. *Spencer,* 485 F.2d 176, 177-178 (5th Cir. 1973). Does it provide a teacher "more than a unilateral expectation" of continued employment? (*Roth,* 408 U.S. at 577). Does it

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[8] A separate statutory provision, dealing with the State's power to discharge teachers during the school year, limits the grounds for discharge to enumerated causes. Section 279.24, 1971 Code of Iowa.

provide "a legitimate claim of entitlement to it"? (*Ibid.*) Is it the type of interest "upon which people rely in their daily lives, reliance that must not be arbitrarily undermined"? (*Ibid.*)

This question is one which has general importance in many states, for the Iowa statutory scheme is not unique. Substantially similar statutes exist in Kansas,[9] Nebraska,[10] North Dakota,[11] Connecticut,[12] Delaware,[13] and perhaps other states. The court below has ruled that such statutes do not create a property interest, thereby disagreeing with the district court in the instant case and a district court in Kansas, but agreeing with a district court in North Dakota.[14] Other courts have noted, without deciding, that such statutes *may* create a "property" interest in continued employment. *Simard* v. *Board of Education of the Town of Groton,* 473 F.2d 988, 990 n. 3, and 992 n. 6 (2nd Cir. 1973); *Mathias* v. *New Castle County Vocational Technical School District,* Civ. Ac. No. 4073 (D. Del. Aug. 31, 1972) (slip opinion at pp. 16-17).[15]

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[9] Kansas Statutes Annotated 72-5411, analyzed in *Endicott* v. *Van Petten,* 330 F. Supp. 678 (D.Kan. 1971).

[10] Nebraska Rev. Stat. § 79-1254, analyzed in *Fisher* v. *Snyder,* 476 F.2d 375 (8th Cir. 1973).

[11] North Dakota Civil Code § 15-47-38, analyzed in *Buhr* v. *Buffalo School District No. 39,* 364 F. Supp. 1225 (D.N.D. 1973).

[12] Conn. Gen. Stat. § 10-151, analyzed in *Simard* v. *Board of Education of Town of Groton,* 473 F.2d 988 (2d Cir. 1973).

[13] 14 Delaware Code § 1410, analyzed in *Mathias* v. *New Castle County Vocational Technical School District,* Civ. Ac. No. 4073 (D. Del. 1972) (slip opinion lodged with Clerk).

[14] Appendix, *infra, App.* 18, 21-22; cases cited in notes 9 and 11, *supra.*

[15] Because *Mathias* has not been officially reported, copies of the slip opinion have been lodged with the Clerk.

The question whether the statutes of these several states create a protectible property interest is one which this Court should reach and decide at the earliest possible time. Otherwise, the rights of teachers in these states will remain doubtful—to the mutual detriment of the teachers and of the school boards which must make employment decisions concerning them. This Court's opinions in *Roth, Sindermann* and *Arnett,* addressed as they were to different factual and statutory situations, do not provide adequate guidance to determine reliably whether the statutes of these states create protectible property interests.

3. If this Court grants certiorari, and concludes that petitioner was entitled to freedom from arbitrary and capricious termination of her employment, we would urge that it reach and decide the question which the court below did not decide: whether it is arbitrary and capricious for a school board to terminate a teacher's employment for the sole reason that her students scored below average on standardized achievement tests, where the evidence at the school board hearing discloses that the publisher of the tests and testing experts all agree that student performance on the tests is not a reliable indicator of teaching performance.

CONCLUSION

For the reasons set forth hereinabove this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
EIGHTH CIRCUIT

No. 73-1067

NORMA SCHEELHAASE,
Plaintiff-Appellee,

v.

WOODBURY CENTRAL COMMUNITY SCHOOL DISTRICT: W. B. DEVINE, Superintendent; LEWIS FOSTER, President of the Board of Education of the Woodbury Central Community School District; JAMES UTESCH, RUSSELL WALKER, DWIGHT RAWSON, LEONARD CASSENS, DWAIN BAIRD and DARRELL SULZBERGER, members of the Board of Education of the Woodbury Central Community School District, and their successors in title, if any, and SYLVAN BRYAN and DALE WEAVER,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Iowa

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Submitted: September 11, 1973.
Filed: November 28, 1973.

Before GIBSON AND BRIGHT, Circuit Judges, and TALBOT SMITH, Senior District Judge.*

TALBOT SMITH, United States Senior District Judge.

The issue before us is one of Federal jurisdiction with

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* Honorable TALBOT SMITH, United States Senior District Judge, Eastern District of Michigan, sitting by designation.

respect to the continued employment of a non-tenured teacher under Iowa law. Her contract was not renewed by the Board of Education. She comes before us "invok[ing] the jurisdiction of this Court pursuant to Amendments I and XIV of the Constitution of the United States and 42 U.S.C. § 1983,"[1] asserting that her nonrenewal "involves an issue of substantive due process."

The facts present a picture of internal and local dissension. On the one hand we have the (then) recently appointed Superintendent of the defendant district, Mr. Devine, and the defendant School Board. On the other we have a discharged teacher (the appellee herein), having had some ten years of school employment, and her supporters. The background of the situation illuminates the issues presented. Superintendent Devine is a relative newcomer to the district, though not to the teaching profession, having been teaching since 1937 and having been Superintendent in various Iowa schools since 1940.

When first interviewed, he testified, he was informed "that the scholastic program at the school had been criticized by the North Central Examining Committee and that they were on the unapproved list of the Iowa Department of Public Instruction and they were criticized by the North Central Association."[2] Under date of November 18, 1968, the Department of Public Instruction of the State of Iowa notified the school district that "you have one year from the date of Board action to correct the indicated deficiencies or

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[1] The trial court found jurisdiction of the parties and the subject matter under 28 U.S.C. § 1343 and 42 U.S.C. § 1983. The First Amendment claim has not been briefed to us and we were informed on oral argument that no claim thereunder is being asserted. The trial court based is determination on the Fourteenth Amendment.

[2] App. 78.

be removed from the list of approved schools."[3] Upon Superintendent Devine's assumption of duties he took various remedial steps, unnecessary to record here. With respect to the appellee, Mrs. Scheelhaase, a tentative decision was reached not to renew her contract[4] and she was so informed, as well as of her statutory rights to a private and public hearing. These were held but, from her point of view, to no avail, for it was the ultimate decision of the Board that her contract not be renewed.[5] This action followed.

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[3] Defendant's Ex. P., App. 165-168. By letter dated October 21, 1969, Superintendent Devine was notified that the school would be continued on the approved list, action having been taken "to correct the previously noted deficiencies" commending "you [Superintendent Devine] and your board of education for this response to meeting minimum standards."

[4] Letter dated March 13, 1970 addressed to Mrs. Scheelhaase from Woodbury Central Community School District signed by W. D. Devine, Superintendent of Schools, states as follows:

"The Woodbury Central School board is considering terminating your contract at the conclusion of the current 1969-70 school year.

"Under Section 279.13 of the Code of Iowa, you have the right to request a private conference with the board. This must be done within five days of the receipt of this notice. You may also request a written statement. In you [sic] case it will be the low scholastic accomplishment as indicated by Basic Skills and I.T.E.D. tests."

[5] Letters dated April 8, 1970 and April 11, 1970, as follows:

"This is official notification that your contract has been terminated effective at the end of the 1969-70 school year. This in compliance with Section 279.139 the Code of Iowa. The complete board was in attendance and the vote was unanimous for termination." /s/ W. H. Devine.

"In compliance with Section 279.13 of the Code of Iowa, the following reason is given for your contract termination.

"Below average scholastic accomplishment of your students in the area of your responsibility. (Language Arts.)

"Our records show that in letters sent to you on March 13 and March 23 the reason was given to you in writing. Our file copies show this fact." /s/ Lewis Foster.

At the trial the appellee contended that she had been discharged solely because of the showing of her students in the tests given them, that such use of the tests "finds no support in educational policy," that, in addition, the appellants had failed to interpret the tests properly, and, moreover, that the tests actually showed her students to be making normal progress. Yet, notwithstanding, her contract had not been renewed. For these reasons, she asserts, the appellants' failure to renew on the ground of allegedly low test scores "violated her Fourteenth Amendment rights."

The appellants, on the other hand, insisted that the tests in fact did reveal low scores for her pupils, that the tests had in fact been properly employed, and that "use of the ITBS scores as a measure of teacher competence stood as a reasonable and valid exercise of administrative discretion." In addition, appellants argue a lack of federal jurisdiction, in that appellee had no constitutionally protected right of renewal, the matter of renewal or nonrenewal of a teacher's contract being entrusted by the applicable state statutes to the discretion of the local Board.

It was the finding of the trial court that a teacher's professional competence could not be determined solely on the basis of her students' achievements on the ITBS (Iowa Test of Basic Skills) and ITED (Iowa Tests of Educational Development), such being the specific reason given for termination,[6] that appellee had a "property interest" in her contract of employment, and, "that the right to renewal thereof may not be denied without due process of law" which demanded that the reasons for termination "may not be arbitrary and capricious but must have a basis in fact." She was ordered reinstated and granted damages.

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[6] Additional reasons for termination, namely, a rote following of text materials, lack of congenial relationship between teacher and pupil, and indications of poor preparation, were sought to be presented at the trial as further justifications but were rejected by the Court as not having been asserted in the administrative proceedings.

Thus the bare bones of the controversy. We will proceed directly to the basic issue before us, the jurisdiction of the Federal court upon these facts. Under Iowa law teachers do not enjoy tenure. Rather they are hired on a year to year basis. The pertinent statute provides that a teaching contract can extend only through the ensuing year and is subject to review on or before April 15th of each year. The appellee was thus put on notice that her contract, under Iowa Law, could not extend for a longer period than the ensuing school year, but that it would be automatically renewed unless the Board of Education decided to terminate. In such event, the statute provides, she is entitled to a private and a public hearing, both of which were had in this case.[7] (Discharge for cause at any time during the school year is covered by another statute, Section 279.24, 1971

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[7] "Contracts with teachers must be in writing, and shall state * * * such other matters as may be agreed upon, which may include employment for a term not exceeding the ensuing school year * * *. Said contract shall remain in force and effect for the period stated in the contract and thereafter shall be automatically continued in force and effect for equivalent periods, * * * until terminated as hereinafter provided * * *. On or before April 15th of each year, the teacher may file his written resignation * * * or the Board may by majority vote of the elected membership of the Board, cause said contract to be terminated by written notification of termination * * * provided, however, that at least ten days prior to mailing of any notice of termination, the Board * * * shall inform the teacher in writing (1) the Board is considering termination of said contract and that (2) the teacher shall have the right to a private conference with the Board if the teacher files a request therefor * * *. The teacher shall have the right to protest the action of the Board and to a hearing thereon * * * in which event the Board shall hold a public hearing on such protest * * *. Upon the conclusion of the hearing, the Board shall determine the question of continuance or discontinuance of the contract by a roll call vote * * *. The foregoing provisions for termination shall not affect the power of the Board of Directors to discharge a teacher for cause under the provisions of Section 279.24 * * *" Section 279.13, 1971 Code of Iowa.

Code of Iowa. The matter before us is a nonrenewal situation, not a discharge for cause.)

The reason for the one-year limitation expressed in the teacher-contract statute was made clear in the case of *Miner* v. *Lovilia Independent School District,* 212 Iowa 973, 234 N.W. 817 (1931) wherein the court examined the contract and held as follows:

> It will be noted that this section is affirmatively mandatory rather than prohibitive. It requires that the contract whatever it be, shall be in writing. It specifies certain subjects to be covered therein. It imposes no disability upon the contracting parties except that the term of service shall not exceed one year. Subject to this single disability, the right of contract, as between contracting parties, is in no manner abridged.
>
> * * *
>
> It is argued that this statute was enacted for the protection of the teacher. There is quite as much reason for saying that it was enacted primarily for protecting the school district. Prior to the enactment of this particular feature of the statute, there existed in many parts of the state quite a notorious and nefarious practice on the part of outgoing school boards whereby teachers selected by the outgoing board were employed for a term of years and this was done for the purpose of circumventing the incoming school board in their legitimate selection of teachers during the terms of their own incumbency. The single disability contained in this section was effective to stop such practice. In all other respects the contents of the contract are to be determined in writing by the mutual agreement of the contracting parties * * *.

As to Section 279.24, the discharge for cause section, the Court held that:

> * * * we find that it provides the method of discharg-

ing a teacher for cause. This statute is applicable to every case of teacher's employment even though the teacher had not consented thereto in his contract.

These two sections must be read together. Neither of them should be strained or emphasized to the impairment of any provision of the other. Nor should either of them be interpreted as to eliminate any of its own provisions. (234 N.W. at 819.)

The case of *Driver* v. *Independent School District of Sioux City,* 224 Iowa 393, 276 N.W. 37 (1937) is also significant in a consideration of the law of Iowa respecting the powers of the Board in the employment of teachers. Here a discharged teacher brought a mandamus action to compel the district to re-employ her as a teacher. With respect to the issue before us the Court held:

> The trial court was correct in holding that the matter of employment of teachers lies wholly within the discretionary power vested in the board of directors. This conclusion is borne out of the following authorities: Section 12441, Code, 1935; 38 C.J. pages 689, 691, 695; *Neilan* v. *Board of Directors,* 200 Iowa 860, 205 N.W. 506; *Drew* v. *School District,* 146 Iowa 721, 125 N.W. 815 * * *. (276 N.W. at 39.)

It is clear from the cases quoted and cited that the function of the Board of Education under the applicable law of Iowa is to further the best interests of that segment of the state's educational system entrusted to its care, *Neilan* v. *Board of Directors of Independent School District of Sioux City, supra,* including within such function the employment of teachers, *Driver* v. *Independent School District of Sioux City, supra.* In the performance of its duties the Board is empowered to act in accordance with its best discretion. It is possible that the discretion of a Board may, at times, to those more generously endowed, seem to have been exercised with a lack of wisdom. But the Board's decisions in

the exercise of its discretion are not vulnerable to our correction merely if they are "wrong", sustainable only if they are "right." As the Iowa court put it in *Rehmann* v. *City of Des Moines,* 204 Iowa 798, 215 N.W. 957 (1927):

> They may judge wrongly, and so may a Court or other tribunal, but the party complaining can have no action when the officers act in good faith and in the line of what they think is honestly their duty. (215 N.W. at 960.)

But the thrust of appellee's argument goes beyond mere error in the exercise of discretion. It is alleged (and was found) to be action so unwarranted in the premises as to be arbitrary and capricious, an abuse of the Board's discretion. And thus it is, against this background of charges, hearings, administrative action, and trial rulings that we reach the question of our jurisdiction in the premises.

The question is not new to us and we need not reexamine in detail. In *Freeman* v. *Gould Special School District of Lincoln County, Ark.,* 405 F.2d 1153 (8th Cir. 1969), we considered the case of six school teachers whose contracts were not renewed at their termination. In Arkansas, as in Iowa, the law does not provide for a tenure system, but rather teachers are employed on an annual contract with automatic renewal unless written notice to the contrary is given within a prescribed time. The Arkansas law did not (unlike Iowa) provide for a hearing, although one was given. It was the claim of the teachers that the Board's decision not to rehire them, on the basis of a recommendation by the principal, was arbitrary, capricious, and unreasonable, thereby violating the due process and equal protection clauses of the Fourteenth Amendment. We held not. It was our holding (*q.v.*) that in the absence of a tenure statute a local school board has the right to decline to employ or to re-employ any teacher for any reason or for no reason as

long as such a decision is not violative of a specific constitutional right. As we there said:

> Almost all of the cases cited in support of plaintiffs' [teachers'] position are concerned with either racial discrimination or an invasion of a constitutionally protected right or privilege by way of a statute or regulation. We agree that the teachers are protected under the Equal Protection Clause from discrimination on account of race or religion or in their assertion of constitutionally protected rights, but no case cited by plaintiffs had gone so far as to say that all actions of any government board or agency in employment cases must accord the individual due process under the Fourteenth Amendment so as to provide tenure and a right to retain the position, except for cause. And 'for cause' presupposes a right to hearing, notice, and appeal. Many government employees are under civil service and some under tenure. Absent these security provisions a public employee has no right to continued public employment, except insofar as he may not be dismissed or failed to be rehired for impermissible constitutional reasons, such as race, religion, or the assertion of rights guaranteed by law or the Constitution. (405 F.2d at 1159.)

The holding is equally applicable here. Stripped to its essentials the appellee's argument, as she puts it, is that "failing to renew a teacher's contract for a reason lacking basis in fact [the results of the tests given] stands especially repulsive to due process fairness where, as here, the teacher enjoys a legitimate expectation of re-employment." It would follow that appellee's years of service with the school district vested in her such a "property" in her job that the theretofore unlimited discretion of the School Board no longer obtained, she being thus invested, as we noted in *Freeman,* with a tenure status, despite the contrary wording of the statute.

But appellee argues that as applied to her situation the authority of *Freeman* is eroded by our later case of *Fisher* v. *Snyder,* 476 F.2d 375 (8th Cir. 1973). We do not so regard it. *Fisher* involved the situation of a female teacher who was discharged on specious and unwarranted grounds of sexual misconduct. We affirmed the district court's finding that although a school board may legitimately inquire into the character and integrity of its teachers, it may not arbitrarily and capriciously discharge a teacher based on unsupported conclusions drawn from such inquiries, in view of the defamatory nature of the charges made. The principle here involved is not to be pushed beyond its narrow parameters upon the theory that any dismissal, particularly for a degree of incompetence, may to some degree impair professional standing. It may, or it may not, depending on the circumstances, but whether or not, what we ruled upon in *Fisher* was essentially a charge of immorality, a slanderous assault upon moral rectitude, not simply an alleged impairment of professional standing by reason of discharge. This, it is clear, does not invoke the *Fisher* doctrine.[8]

Finally, we are constrained to observe, in view of the multiplicity of "civil rights" actions now being brought into the Federal courts on non-racial, non-specific constitutional grounds, that

> Not every civil right is a right derived or secured by the Constitution or laws of the United States * * *. Only those rights, privileges and immunities that are

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[8] *Cf. Board of Regents* v. *Roth,* 408 U.S. 564 (1972) wherein the Court differentiated two situations: One, in which a State, in declining to rehire a teacher, made no charge against him "that might seriously damage his standing and associations in his community," the other where the nonrenewal is based "on a charge, for example, that he had been guilty of dishonesty or immorality." In that situation, commented the Court, "this would be a different case." 408 U.S. at 573.

> secured by the Constitution of the United States or some Act of Congress are within the protection of the federal courts. Rights, privileges and immunities not derived from the federal Constitution or secured thereby are left exclusively to the protection of the states. [1 Barrow & Holtzoff, *Federal Practice and Procedure*, § 37.]

Significant, also, not only with respect to the above *caveat*, but as well with respect to the many cases involving the discharge of teachers now coming before the Federal courts as civil rights actions,[9] are the concurring observations of Chief Justice Burger in *Board of Regents* v. *Roth, supra,* and *Perry* v. *Sindermann,* 408 U.S. 593 (1972):

> I concur in the Court's judgments and opinions in *Perry* and *Roth* but there is one central point in both decisions that I would like to underscore since it may have been obscured in the comprehensive discussion of the cases. That point is that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law. The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract. Thus, whether a particular teacher in a particular context has any right to such administrative hearing hinges on

[9] Brief of amicus National Education Association cites to us some eighty cases in this and related areas. See, also, comprehensive review of cases in *Freeman* v. *Gould, supra,* and *Orr* v. *Trinter,* 444 F.2d 128 (6th Cir. 1971), and cases therein cited. Law review studies, written prior to *Board of Regents,* and *Perry, supra,* are numerous, the leading articles and comments, with discussions of principles involved will be found in recent comments in 49 *N.C.L. Rev.* 302 (1971), 19 *U.C.L.A.L. Rev.* 1052 (1972) and 44 *N.Y.U.L. Rev.* 836 (1969).

a question of state law. The Court's opinion makes this point very sharply:

> 'Property interests * * * are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law * * *.' *Board of Regents* v. *Roth, ante,* at 577.

Because the availability of the Fourteenth Amendment right to a prior administrative hearing turns in each case on a question of state law, the issue of abstention will arise in future cases contesting whether a particular teacher is entitled to a hearing prior to nonrenewal of his contract. If relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether he is constitutionally entitled to a prior hearing, and the teacher should be left to resort to state courts on the questions arising under state law.

We need not pass upon the nature of the interest of the teacher required that she may demand as of right a hearing upon her termination, *Perry* v. *Sindermann, supra,*[10] for here the governing statute provided for a hearing, which she had. It is our holding that the administration of the internal affairs of the school district before us has not passed by judicial fiat from the local board, where it was lodged by statute, to the Federal court. Such matters as the competence of teachers, and the standards of its measurement are not, without more, matters of constitutional dimensions. They are peculiarly appropriate to state and local administration.

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[10] "Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603.

In this case we find no violation of appellee's civil rights, nor a Federal due process issue. In short, as we held in *Harnett* v. *Ulett,* 466 F.2d 113 (8th Cir. 1972), citing *Freeman* v. *Gould, supra,*

> *Roth* [*supra*] and *Sindermann* [*supra*] adhere to the principle that absent contractual, legislative or constitutional provision on the subject, the power of removal is incident to the power of appointment, and government employment can be revoked at the will of the appointing officer. [466 F.2d at 117.]

In the view we have taken of the case we do not rule upon the additional issues presented.

The decision of the District Court is reversed and the case is remanded with instructions to dismiss the complaint.

BRIGHT, Circuit Judge, Concurring.

My concurrence is limited to the result. In light of our recent decisions in *Strickland* v. *Inlow,* No. 72-1774 (8th Cir., filed Aug. 29, 1973) and *Fisher* v. *Snyder,* 476 F.2d 375 (8th Cir. 1973), I think it is fair to say that the concept of substantive due process is not wholly alien to the administration of public schools.

We need not spell out the dimensions or limitations of that doctrine here, for I am satisfied on this record that appellee has not shown the action of the Board to have been arbitrary and capricious.

The record in this case shows that Superintendent W. B. Devine came to the Woodbury school system prior to the 1969-1970 school year. He testified as to his efforts to upgrade the school system. In February, he visited appellee's English class and observed her teaching methods and her classroom relationship with students. Following this visitation he advised appellee that her work was unsatisfactory.

On March 13, 1970, he wrote Mrs. Scheelhaase:

The Woodbury Central School board is considering

terminating your contract at the conclusion of the current 1969-70 school year.

Under Section 279.13 of the Code of Iowa, you have the right to request a private conference with the board. This must be done within five days of the receipt of this notice. You may also request a written statement. In you [sic] case it will be the low scholastic accomplishment as indicated by Basic Skills and I.T.E.D. tests.

The notice of termination given by the Board reiterated:

In compliance with Section 279.13 of the Code of Iowa, the following reason is given for your contract termination.

Below average scholastic accomplishment of your students in the area of your responsibility. (Language Arts)

* * *

At the trial, Superintendent Devine testified that he had recommended that the Board not renew her contract because her students displayed low scholastic performance in the language arts area and that one of the indications of this low achievement was the current Basic Skills tests. Mrs. Scheelhaase's witnesses all testified that it was improper to use these test scores as a basis for evaluating a teacher's performance. The district court specifically found in this regard:

4. The specific reason given plaintiff for termination was her professional incompetence as indicated by the low scholastic accomplishment of her students on the Iowa Tests of Basic Skills (ITBS) and Iowa Tests of Educational Development (ITED) [footnote omitted].

5. A teacher's professional competence cannot be determined solely on the basis of her students' achievement on the ITBS and ITED, especially where the students maintain normal educational growth rates.

* * *

But neither the testimony of appellee's experts in the edu-

cational field nor the trial court's finding suffices to establish the actions of the Board or Superintendent Devine as arbitrary and capricious.

Appellant-Devine possesses a Masters Degree in his field and has attained credit toward a Ph.D. He has served as a teacher and a superintendent of schools for more than 14 years. In his work he has made a study of the Iowa Tests of Basic Skills and of Educational Developments. Without dispute, Mrs. Scheelhaase's students disclosed below-average accomplishment in her subjects. The superintendent, in concluding on his experience that these test results reflected adversely upon the teaching competence of Mrs. Scheelhaase, may have been erroneous but the conclusion was not an unreasoned one, and that is the test.

The Board was entitled to rely upon the recommendation and conclusions of its Superintendent, notwithstanding the existence of strong opinions contrary to his regarding the use of the ITBS or ITED tests as a tool for teacher evaluation. Given a choice between experts, the Board was entitled to rely upon its own. In this case, the district court found that, "[a] teacher's professional competence cannot be determined solely on the basis of her students' achievement on the ITBS and ITED, especially where the students maintain normal educational growth rates." We have no disagreement with such a statement. But in the Woodbury School District, based upon his education and training, the Superintendent arrived at a contrary determination relating to students in Mrs. Scheelhaase's class. Thus its decision, even though premised upon an apparently erroneous "expert opinion," cannot be faulted as arbitrary and capricious. The Board's mere mistake in judgment or in weighing the evidence does not demonstrate any violation of substantive due process.

The Superintendent and the Board for the Woodbury, Iowa, Central Community School District possessed the

right and responsibility of evaluating its teacher personnel, and such evaluations, where they are based on some evidence, even though possibly erroneous, will not serve to make those determinations subject to judicial review as unconstitutionally arbitrary and capricious.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE
EIGHTH CIRCUIT
September Term, 1973

No. 73-1067

NORMA SCHEELHAASE, *Appellee,*
v.
WOODBURY CENTRAL COMMUNITY SCHOOL DISTRICT, ET AL,
Appellants.

Appeal from the United States District Court for the Northern District of Iowa

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The Court having considered petition for rehearing en banc filed by counsel for appellee Norma Scheelhaase, and for amicus curiae National Education Association and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 30, 1974

(Caption Omitted)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed August 28, 1972)

In this action plaintiff teacher seeks affirmative relief in the form of reinstatement to her former position of employment and damages. After trial to the court, the case was submitted on written briefs and arguments.

Findings of Fact

1. Plaintiff was employed as a grade school teacher by the defendant Woodbury Central Community School District (Board) from 1960 to 1970.

2. At the conclusion of the 1969-1970 school year, plaintiff's contract was terminated by the Board under provisions of Iowa Code 279.13 (1972).[1]

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[1] Iowa Code 279.13 (1971) provides in part as follows:

Said contract shall remain in force and effect for the period stated in the contract and thereafter shall be automatically continued in force and effect for equivalent periods . . . until terminated as hereinafter provided, . . . On or before April 15 . . . the board may . . . cause said contract to be terminated by written notification of termination, . . . however, . . . the board . . . shall inform the teacher in writing that (1) the board is considering termination of said contract and that (2) the teacher shall have the right to a private conference with the board if the teacher files a request therefor . . .; and if . . . the teacher files . . . a request for a conference and a written statement of specific reasons for considering termination, the board shall give . . . specific reasons for considering termination, and shall hold a private conference. . . . The teacher shall have the right to protest the action of the board, and to a hearing thereon . . . in which event the board shall hold a public hearing on such protest. . . .

3. Both a private conference and public hearing were granted plaintiff pursuant to the statute.

4. The specific reason given plaintiff for termination was her professional incompetence as indicated by the low scholastic accomplishment of her students on the Iowa Tests of Basic Skills (ITBS) and Iowa Tests of Educational Development (ITED).[2]

5. A teacher's professional competence cannot be determined solely on the basis of her students' achievement on the ITBS and ITED, especially where the students maintain normal educational growth rates.

6. As a result of termination of her employment contract, plaintiff was damaged in the sum of $13,644.

Conclusions of Law

1. The court has jurisdiction of the parties and the subject matter. 28 U.S.C. 1343; 42 U.S.C. 1983.

2. In Iowa termination of a teacher's contract by nonrenewal is permitted only after granting the procedural rights to conference and hearing accompanied by a "written statement of specific reasons" for nonrenewal. Iowa Code 279.13 (1971).

3. In Iowa a teacher has a "property interest" in a contract of employment and the right to renewal thereof may not be denied without due process of law. Iowa Code 279.13 (1971); *Perry* v. *Sindermann,* —— U.S. ——, (June 29, 1972); *Board of Regents* v. *Roth,* —— U.S. ——, (June 29, 1972); *Wilson* v. *Pleasant Hill School,* —— F.2d ——, (8th Cir. August 4, 1972); *Wilderman* v. *Nelson,* —— F.2d ——, (8th Cir. October 4, 1972).

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[2] At trial defendants urged additional reasons for termination which the court will not consider nor make judgment as to their sufficiency since they were not given as specific reasons at the statutory conference and hearing.

4. Due process demands that reasons for termination of a teacher's contract may not be arbitrary and capricious but must have a basis in fact. *Perry* v. *Sindermann, supra; Board of Regents* v. *Roth, supra; Wilson* v. *Pleasant Hill School, supra;* Cf. *Freeman* v. *Gould,* 405 F.2d 1153 (8th Cir. 1969). *See, Drown* v. *Portsmouth School District,* 415 F.2d 1106 (1st Cir. 1971).

5. Plaintiff is entitled to damages from all defendants, except defendant Woodbury Central Community School District, in the amount of $13,644. *Harkless* v. *Sweeny Independent School District,* 427 F.2d 319, *cert. den.* 400 U.S. 991 (1970); *Cooley* v. *Board of Education,* 453 F.2d 282, 287 (8th Cir. 1972); *Board of Trustees of Arkansas A & M College* v. *Davis,* 396 F.2d 730, 734 (8th Cir. 1968), *cert. den.; Basista* v. *Weir,* 340 F.2d 74, 86 (3rd Cir. 1965).

It is therefore
ORDERED

1. That the defendants forthwith reinstate plaintiff to her former teaching position or if unavailable to a similar or comparable position in the Woodbury Central Community School District.

2. The Clerk shall enter judgment in accordance herewith.

November 1, 1972.

/s/ Edward J. McManus
Chief Judge
United States District Court

(Caption Omitted)

JUDGMENT
(Filed November 2, 1972)

This action came on for trial before the Court, Honorable Edward J. McManus, United States District Judge, presid-

ing, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the defendants, WOODBURY CENTRAL COMMUNITY SCHOOL DISTRICT; W. B. DEVINE, Superintendent: LEWIS FOSTER, President of the Board of Education of the Woodbury Central Community School District; JAMES UTESCH, RUSSELL WALKER, DWIGHT RAWSON, LEONARD CASSENS, DWAIN BAIRD and DARRELL SULZBERGER, members of the Board of Education of the Woodbury Central Community School District, and their successors in title, if any, and SYLVAN BRYAN and DALE WEAVER, forthwith reinstate plaintiff, NORMA SCHEELHAASE, to her former teaching position or if unavailable to a similar or comparable position in the Woodbury Central Community School District.

IT IS FURTHER ORDERED and ADJUDGED THAT THE PLAINTIFF NORMA SCHEELHAASE, recover of the defendants, with the exception of defendant, WOODBURY CENTRAL COMMUNITY SCHOOL DISTRICT, the sum of Thirteen Thousand Six Hundred Forty Four Dollars ($13,644.), with interest thereon as provided by law, and her costs of action.

Dated at Sioux City, Iowa, this 2nd day of November, 1972.

K. W. Fuelling
Clerk of Court

By /s/ D. Henry
Deputy

(Caption Omitted)

ORDER
(Filed December 13, 1972)

This matter is before the court on defendants' motion for a new trial, filed November 13, 1972 and the resistance thereto. After trial to the court, plaintiff was granted dam-

ages and reinstatement. Defendants, in seeking a new trial, dispute specific findings of fact and conclusions of law.

After examining the record, and briefs of counsel, the court denies defendants motion.

In its order of November 2, 1972, the court found that the specific reason given plaintiff for termination to be her "professional incompetence as indicated by the low scholastic accomplishment of her students on the Iowa Test of Basic Skills (ITBS) and Iowa Tests of Educational Development (ITED)." The record supports this finding as not only the specific but also the only reason given. The record also supports the proposition that use of these tests as the sole judge of a teacher's competence is arbitrary and capricious.

The damages awarded are for lost earnings and are supported by the record.

The court's conclusion that a teacher in Iowa has a "property interest" in a contract of employment is based on the Iowa law. Iowa Code 279.13 (1971). Courts in recent cases have uniformly denied procedural due process to nontenured public employees absent a showing that the employee has what has been variously termed a "legitimate entitlement," "de facto tenure" or a "property interest" in employment. *Perry* v. *Sindermann,* —— U.S. —— (June 29, 1972); *Board of Regents* v. *Roth,* —— U.S. —— (June 29, 1972); *Diles* v. *Woolsey,* —— F.2d —— (8th Cir. October 19, 1972); *Wilderman* v. *Nelson,* —— F.2d —— (8th Cir. October 4, 1972); *Harnett* v. *Vlett,* —— F.2d —— (8th Cir. August 22, 1972); *Wilson* v. *Pleasant Hill School,* —— F.2d —— (8th Cir. August 4, 1972); *Ahmad* v. *Redeker,* Case 72-C-512-EC (N.D. Iowa, November 8, 1972).

This "entitlement" can arise from the actual practices, from rules and regulations or, as in this case, the law of the state.

It is therefore
ORDERED

1. Defendants' motion for a new trial is denied.

2. The court's order of November 2, 1972 is amended to exclude defendants, Utesch and Sulzberger.

December 12, 1972.

/s/ Edward J. McManus
Chief Judge
United States District Court